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In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWARD JOSEPH WEDELSTEDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinion below 1

Jurisdiction 1

Questions presented 1

Statement 2

Argument 5

Conclusion 14

CITATIONS

Cases:

Aguilar v. *Texas*, 378 U.S. 108 12

Berenyi v. *Immigration Director*, 385 U.S. 630 ..... 11, 14

Braverman v. *United States*, 317 U.S. 49 7

Burdeau v. *McDowell*, 256 U.S. 465 10

Coolidge v. *New Hampshire*, 403 U.S. 443 10

Cupp v. *Naughten*, 414 U.S. 141 13

Iannelli v. *United States*, 420 U.S. 770 7

Lawn v. *United States*, 355 U.S. 339 10

Miller v. *California*, 413 U.S. 15 12

Moss v. *United States*, 132 F. 2d 875 8

Nye & Nissen v. *United States*, 336 U.S. 613 14

Pinkus v. *United States*, 436 U.S. 293 13

Samuel v. *United States*, 169 F. 2d 787 9

Page

Cases—continued:

Smith v. *United States*, 431 U.S. 291 3
State v. *Wedelstedt*, 213 N.W. 2d 652 3
United States v. *Adams*, 422 F. 2d 515 10
United States v. *Baranski*, 484 F. 2d 556 ..... 7, 9
United States v. *Carman*, 577 F. 2d 556 8
United States v. *Chestnut*, 533 F. 2d 40, cert. denied, 429 U.S. 829 7
United States v. *Clegg*, 509 F. 2d 605 11
United States v. *Cruz*, 581 F. 2d 535 10
United States v. *Dansker*, 537 F. 2d 40 9
United States v. *Dixon*, 536 F. 2d 1388 8
United States v. *Elmore*, 423 F. 2d 775, cert. denied, 400 U.S. 825 10
United States v. *Harris*, 403 U.S. 573 12
United States v. *Luciow*, 518 F. 2d 298 ..... 10, 11
United States v. *Miller*, 546 F. 2d 320 7
United States v. *Mireles*, 570 F. 2d 1287 10
United States v. *Papadakis*, 510 F. 2d 287, cert. denied, 421 U.S. 950 8
United States v. *Polk*, 550 F. 2d 566 7
United States v. *Roberts*, 548 F. 2d 665, cert. denied, 431 U.S. 931 7

Page

Cases—Continued:

United States v. *Rosenbarger*, 536 F. 2d 715, cert. denied, 431 U.S. 965 12
United States v. *Scholle*, 553 F. 2d 1109, cert. denied, 434 U.S. 940 7
United States v. *Sherwin*, 539 F. 2d 1 10
United States v. *Tanner*, 471 F. 2d 128, cert. denied, 409 U.S. 949 8
United States v. *Tarnopol*, 561 F. 2d 466 9
Van Liew v. *United States*, 321 F. 2d 664 ... 9

Constitution, statutes and regulations:

United States Constitution, Fourth Amendment 9, 11
18 U.S.C. 2 2
18 U.S.C. 3 2
18 U.S.C. 371 2
18 U.S.C. 1465 ..... 2, 6, 8
18 U.S.C. 2314 6
18 U.S.C. 2315 ..... 2, 6, 8
Fed. R. Crim. P. 8(a) 7
Fed. R. Evid. 404(b) 7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A11-A35) is reported at 589 F. 2d 339.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1978. A petition for rehearing was denied on January 9, 1979. On January 27, 1979, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including March 10, 1979. The petition for a writ of certiorari was filed on March 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the inclusion of a non-federal crime as an overt act in a multiple objective conspiracy count constituted prejudicial error.

2. Whether the seizure of evidence by a private citizen acting on his own initiative is subject to Fourth Amendment constraints.

3. Whether the affidavit supporting the state search warrant established probable cause.

4. Whether the trial court's "contemporary community standards" charge properly guided the jury in its evaluation of allegedly obscene materials.

5. Whether the evidence sufficiently supported petitioner's conviction for aiding and abetting in the interstate transportation of obscene films.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioner was convicted on one count of receiving stolen goods that had traveled in interstate commerce, in violation of 18 U.S.C. 2315 and 2, one count of interstate transportation of obscene materials, in violation of 18 U.S.C. 1465, 2 and 3, and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371.[1] Petitioner received concurrent sentences of five, three, and five years' imprisonment, respectively, and a total of $7,500 in fines. The court of appeals affirmed (Pet. App. A11-A35).

[1]The district court dismissed another count, alleging interstate transportation of stolen goods, prior to trial, and, during the trial, it dismissed at the government's request still another count involving receipt of stolen goods.

The evidence showed that on September 2, 1974, Thomas Meade and Joseph Castenada burglarized the Davenport, Iowa home of David Shepard and escaped with about 1,200 prints of classic motion pictures, worth nearly $100,000 (the Shepard films). Meade, who worked for petitioner, then sold these films to petitioner for $10,000. Petitioner, the owner of a Cedar Rapids, Iowa firm specializing in the distribution and sale of pornographic magazines and films,[2] stored the films in a bin on his Iowa farm. Subsequently, unbeknownst to petitioner, Meade contacted agents of Iowa's Bureau of Criminal Investigation (BCI) seeking immunity with regard to this burglary. On September 19, 1974, he was granted immunity in return for his assistance in investigating petitioner. Accordingly, Meade cooperated in making tape recordings of face-to-face and telephonic conversations with petitioner that were later introduced at trial (Tr. 108-110, 169-172, 488-489, 493-495, 560-564, 570-589, 654; Gov't Exhs. 24-A-1, 24-B-1, 25-A, 25-B-1, 26-A, 28-A).

In November 1974, petitioner and Bruce Gentry, who was also employed by petitioner, went to Chicago to acquire pornographic films for petitioner's business. After arranging the purchase, petitioner told Gentry that they could easily reduce the cost for these films by stealing them from the distributor. Upon their return to Cedar Rapids, petitioner recruited Meade to join the burglary attempt. Meade accepted this offer, and on November 23, 1974, he and Gentry went to Chicago in order to burglarize the warehouse.[3]

[2]See *Smith* v. *United States*, 431 U.S. 291, 294 (1977) (discussing *State* v. *Wedelstedt*, 213 N.W. 2d 652 (Iowa 1973)).

[3]Meade reported these plans to the BCI agents, who told Meade to go along with petitioner's plan and that they would see to it that the burglary was stopped.

However, after observing too many people in the vicinity of the building, they decided to postpone their burglary and returned to Cedar Rapids to report their failure to petitioner. Meade and petitioner agreed that he (Meade) and Gentry would soon return to Chicago to carry out the "project" (Tr. 259-260, 267-268, 606-613).

Subsequently Gentry decided to complete the burglary without Meade. He recruited two other thieves (Dobler and Leone) and at approximately midnight on December 8, 1974 they stole approximately 1,000 pornographic films from the Chicago warehouse (the Chicago films). The three conspirators then drove through the night arriving at petitioner's home in Cedar Rapids in the early morning. Later that day petitioner paid the thieves $2,500 for the films (Tr. 270-285, 295).[4]

Meanwhile, Meade arranged to sell the Shepard films to some "West Coast buyers." Although petitioner initially sought to make a deal with various out-of-state collectors he knew, he ultimately directed Meade to tell his contacts that the films were available for $50,000-$60,000 (Tr. 505, 511). On December 14, 1974, FBI Agent James Gibson called petitioner from a Cedar Falls, Iowa motel and, posing as the West Coast buyer, arranged to purchase the films for $50,000. Then, on December 16, in accordance with petitioner's instructions Meade, Gentry and another conspirator drove a rented truck carrying the films from Cedar Rapids to Cedar Falls, where the sale was to be consummated. At the motel, police officers

[4]Gentry testified that the original agreement was for only $1,500, but that after viewing the films, petitioner agreed to pay $2,500 (Tr. 283).

arrested all three men, and seized the Shepard films. Thereafter, the state authorities arrested petitioner and, pursuant to a warrant, seized the Chicago films, which were being stored in petitioner's warehouse (Tr. 505, 511, 587-604).

ARGUMENT

1. Petitioner contends (Pet. 13-18) that his conviction for conspiracy should be reversed because one of the objectives of the conspiracy that was proved at trial was not a federal crime. However, the courts below correctly rejected this claim, and further review of this factbound question by the Court is unwarranted.

a. This indictment charged petitioner with substantive offenses arising out of both the Shepard and Chicago film burglaries. In addition, both of these criminal transactions constituted objectives of the multi-objective conspiracy count. Before trial, the district court dismissed the substantive count involving the Shepard films because of the apparent lack of nexus between the theft and sale of these films and interstate commerce.[5] Since the government's case regarding the Shepard films arguably supported a jury finding that petitioner had conspired to transport stolen goods in interstate commerce, the court declined, however, to strike the Shepard transaction from the conspiracy count (Tr. 3-9; see also Pet. App. A38-A39).

[5]The Shepard films, which, of course, had at one time traveled in interstate commerce, were stolen and sold in Iowa. Because petitioner had sought to sell the films to various out-of-state buyers and because he sold the films to an undercover agent believing him to be a "West Coast buyer," the government contended that sale and transportation of stolen goods in interstate commerce were involved.

At trial the government produced substantial evidence—including the testimony of co-conspirators Meade, Gentry, Dobler and Leone—concerning both the Chicago and the Shepard transactions. The court instructed the jury to consider the testimony about the Shepard films solely in relation to the conspiracy count. The court further charged the jury that it should find petitioner guilty on the conspiracy count if it found that there was an agreement among the various individuals to commit any offense against the United States, and that a conspirator had performed any overt act (Tr. 945-949). In accordance with the indictment, the court told the jury that the alleged multiple objectives of the conspiracy were (1) the interstate transportation of stolen goods (18 U.S.C. 2314); (2) the receipt, concealment or sale of stolen goods that are part of or constitute interstate commerce (18 U.S.C. 2315); and (3) interstate transportation of obscene materials (18 U.S.C. 1465). The jury rendered a general verdict of guilty on the conspiracy count and the two substantive counts involving the Chicago films.

Petitioner claims that he was improperly convicted of conspiracy because the jury's general verdict on that count might have been based solely on the Shepard transaction. This claim assumes erroneously that because the evidence concerning the Shepard transactions was arguably insufficient to constitute a violation of Section 2314, it was also insufficient to support a finding that petitioner had conspired to transport the stolen Shepard films in interstate commerce. To the contrary, the district court, after viewing all of the evidence, correctly concluded that "[t]he evidence clearly established the existence of [a conspiracy to sell and

transport the stolen films in interstate commerce]" (Pet. App. A38-A39).[6] Accordingly, the jury was entitled to convict petitioner for conspiracy based on the Shepard transaction as well as the Chicago films incidents.[7]

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[6]The testimony and tape recordings demonstrated that petitioner had attempted to sell the Shepard films to out-of-state buyers in Las Vegas, Nevada and Chicago, Illinois. More important, petitioner actually arranged with Meade, Gentry, Leone and other conspirators to put the films in a rented trailer that the West Coast buyer could drive back to California and to deliver the films to the buyer ready for transportation (Tr. 565-604; Gov't Exh. 24-A-1 to 28-A). That the buyer turned out to be a police officer arguably precluded the jury from finding that petitioner had transported the films in interstate commerce; it did not preclude the jury from convicting petitioner for conspiracy to commit that offense since completion of the underlying federal offense is not an element of conspiracy. See, *e.g.*, *Iannelli* v. *United States*, 420 U.S. 770, 777-778, 785-786 n.17 (1975); *Braverman* v. *United States*, 317 U.S. 49, 54 (1942); *United States* v. *Miller*, 546 F. 2d 320, 325 (9th Cir. 1976); *United States* v. *Baranski*, 484 F. 2d 556, 560 (7th Cir. 1973).

[7]Petitioner's further contention (Pet. 19-21) that the joinder of the Shepard theft to the Chicago films theft unduly prejudiced him is without basis. The two incidents were but two objects of the same conspiracy involving the same actors, the same principal leader (petitioner), and the same modus operandi. See Fed. R. Crim. P. 8(a). Indeed, even if the evidence concerning the Shepard transaction did not prove a federal crime, it nonetheless constituted other crimes evidence admissible under Fed. R. Evid. 404(b) to demonstrate petitioner's knowing and intentional participation in an ongoing scheme. See, *e.g.*, *United States* v. *Scholle*, 553 F. 2d 1109, 1120-1121 (8th Cir.), cert. denied, 434 U.S. 940 (1977); *United States* v. *Polk*, 550 F. 2d 566 (9th Cir. 1977); *United States* v. *Roberts*, 548 F. 2d 665, 667 (6th Cir.), cert. denied, 431 U.S. 931 (1977); *United States* v. *Chestnut*, 533 F. 2d 40, 49-50 (2d Cir.), cert. denied, 429 U.S. 829 (1976).

b. Furthermore, even assuming, arguendo, that the evidence concerning the Shepard films was insufficient to support the conspiracy count, there is no merit to petitioner's attack upon his conspiracy conviction. In addition to that count, petitioner was convicted of two substantive federal offenses—the receipt of stolen goods in interstate commerce (18 U.S.C. 2315) and the interstate transportation of obscene materials (18 U.S.C. 1465). Because the theft and transportation of the Chicago films were known to have been effected by petitioner's co-conspirators without petitioner's presence, the jury's conviction on the substantive counts necessarily entailed a finding that petitioner had agreed with Gentry and the others to transport the stolen, obscene materials back to Iowa. There is thus no possibility that the jury found that petitioner had conspired only with regard to the Shepard films. Therefore, at least in the limited circumstances of this case, the court of appeals was undoubtedly correct in affirming petitioner's conspiracy conviction even if one of the objects of that conspiracy did not constitute a federal crime (Pet. App. A14-A17). Accord, *United States* v. *Dixon*, 536 F. 2d 1388, 1401-1402 (2d Cir. 1976); *United States* v. *Papadakis*, 510 F. 2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950 (1975); *United States* v. *Tanner*, 471 F. 2d 128, 140 (7th Cir.), cert. denied, 409 U.S. 949 (1972); *Moss* v. *United States*, 132 F. 2d 875, 878 (6th Cir. 1943).[8]

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[8]As petitioner notes (Pet. 17-18), the courts of appeals have disagreed over the broader question whether a multiple objective conspiracy conviction must always be reversed whenever one or more convictions on the substantive counts that are objects of the conspiracy are reversed. Compare *United States* v. *Dixon, supra; United States* v. *Tanner, supra;* and *Moss* v. *United States, supra*; with *United States* v. *Carman*, 577 F. 2d 556, 566-568 (9th Cir. 1978); *United States* v. *Tarnopol*, 561 F. 2d 466, 475 (3d Cir. 1977); *United States* v. *Dansker*, 537 F. 2d 40, 51 (3d Cir. 1976); *United States* v. *Baranski*, 484 F. 2d 556, 560-561 (7th Cir. 1973); *Van Liew* v. *United States*, 321 F. 2d 664, 672 (5th Cir. 1963). However, none of the cases relied upon by petitioner conflict with the result reached by the court below.

Thus, in both *United States* v. *Tarnopol, supra*, and *Van Liew* v. *United States, supra*, all of the substantive counts constituting objects of the conspiracy were reversed. In that circumstance, unlike the instant case, there may be a substantial possibility that the jury relied upon an improper theory or inconclusive facts in convicting the defendant of conspiracy. And in *United States* v. *Dansker, supra*, 537 F. 2d at 51; *United States* v. *Baranski, supra*, 484 F. 2d at 560; and *Samuel* v. *United States*, 169 F. 2d 787, 795 (9th Cir. 1948), the courts of appeals expressly pointed out that in those particular cases, the jury could rationally have concluded that the defendants had conspired only as to the reversed count. Here, of course, the jury's verdict of guilty on the substantive counts necessarily demonstrated that petitioner had conspired to commit at least one federal offense. Nor is the Ninth Circuit's narrow decision in *United States* v. *Carman, supra*, at odds with the decision below. In *Carman*, the court stated only that a "conspiracy conviction is immune from attack on appeal *so long as no substantive count conviction is overturned because the count failed to state a crime.*" 577 F. 2d at 567 (emphasis in original). The court specifically declined to decide whether defects in the substantive count other than the failure of the indictment to state a crime—such as the alleged evidentiary failure that occurred here—would render the conspiracy conviction voidable. *Id.* at 568. See also *Samuels* v. *United States, supra*.

In demonstrating that no conflict exists among the courts of appeals as to the limited issue presented by the facts of this case, we do not intend to suggest that the government acquiesces in any of the decisions relied upon by petitioner. To the contrary, we think that some, if not all, of these cases were wrongly decided.

2. Petitioner next claims (Pet. 22-30) that the district court erred in admitting into evidence an inventory list of the Chicago films that was seized by Meade without a warrant. At the outset, we note that petitioner affirmatively waived his Fourth Amendment objection

to this evidence at trial.[9] Moreover, the exclusionary rule applies only to evidence obtained as the result of official misconduct. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487-488 (1971); *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921). Where a private individual, such as Meade,[10] seizes the challenged evidence, that evidence is admissible unless "in light of all the circumstances of the case, [that individual] must be regarded as having acted as an 'instrument' or agent of the state [for purposes of the seizure]." *Coolidge* v. *New Hampshire, supra*, 403 U.S. at 487. Because the Iowa police had no prior knowledge of Meade's spontaneous decision to seize the list and had neither participated in nor instigated the seizure,[11] both courts below correctly rejected petitioner's essentially factual claim on this point (Pet. App. A24-A26, A37). See, *e.g.*, *United States* v. *Sherwin*, 539 F. 2d 1, 5-6 (9th

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[9]Ordinarily, a defendant's pretrial motion to suppress evidence preserves his objection for appellate review. See *Lawn* v. *United States*, 355 U.S. 339, 353 (1958); *United States* v. *Cruz*, 581 F. 2d 535, 542 (5th Cir. 1978) (en banc). Here, however, petitioner's counsel affirmatively used the list to cross-examine a government witness, and then stated he had no objection when the government thereafter introduced the list into evidence (Tr. 100). In these circumstances, the court of appeals correctly concluded that petitioner had consciously and intentionally waived his objection (Pet. App. A23-A24). See *Lawn* v. *United States*, *supra*, 355 U.S. at 354-355; *United States* v. *Mireles*, 570 F. 2d 1287, 1290 (5th Cir. 1978); *United States* v. *Elmore*, 423 F. 2d 775 (4th Cir.), cert. denied, 400 U.S. 825 (1970); *United States* v. *Adams*, 422 F. 2d 515, 518 (10th Cir. 1970).

[10]The fact that Meade was a government informant at the time of the seizure does not automatically convert Meade's acts into those of the government. See *United States* v. *Luciow*, 518 F. 2d 298, 299-300 (8th Cir. 1975).

[11]Both Meade and the Iowa police testified that Meade had acted on his own (Pet. App. A24-A25 & n.10; Tr. 623).

Cir. 1976) (en banc); *United States* v. *Luciow*, 518 F. 2d 298, 299-300 (8th Cir. 1975); *United States* v. *Clegg*, 509 F. 2d 605, 607-611 (5th Cir. 1975). Further review of these concurrent findings by this Court is unwarranted. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

3. Petitioner also contends (Pet. 30-34) that the state officers' search of his warehouse violated the Fourth Amendment because the affidavit submitted in support of the state search warrant did not establish probable cause. However, both lower courts rejected petitioner's arguments on this point in careful opinions upon which we substantially rely (Pet. App. A27-A30, A37-A38, A57-A60).

Thus, the challenged affidavit related that Meade, who originally was supposed to steal the Chicago films for petitioner, had personally seen the stolen films in petitioner's warehouse.[12] The affidavit further stated that the agent had overheard a conversation between Meade and petitioner wherein petitioner had acknowledged that he had arranged for the films to be stolen without Meade's involvement. These detailed averments, based on the personal observations of petitioner's employee and co-conspirator, adequately explained why the agents had probable cause to believe that petitioner was storing the stolen films in his warehouse.

Moreover, the affidavit "informed [the issuing judge] of some of the underlying circumstances * * * from which the officer concluded that [Meade] * * * was

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[12]Relevant portions of the affidavit are quoted in the court of appeals' opinion (Pet. App. A27-A28).

'credible' or his information 'reliable.' " *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964) (footnote omitted). It described in detail Meade's previously reliable information concerning petitioner, and pointed out that his statements carried their own indicia of reliability because of their self-incriminating nature. See, *e.g.*, *United States* v. *Harris*, 403 U.S. 573, 583-584 (1971); *United States* v. *Rosenbarger*, 536 F. 2d 715, 719 (6th Cir. 1976), cert. denied, 431 U.S. 965 (1977). In addition, Meade's assertions were substantially corroborated by the fact of the film theft, by the monitored conversation between Meade and petitioner, and by the list of films attached to the affidavit.[13]

4. Petitioner's further contention (Pet. 34-38) concerning the trial court's obscenity instruction is also without merit. Petitioner acknowledges that the district court began its obscenity charge by setting forth almost verbatim the three-prong test established in *Miller* v. *California*, 413 U.S. 15, 24 (1973).[14] Petitioner also agrees (Pet. 35) that the trial judge, after explicating the first prong of the *Miller* test

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[13]As we have established in point 2, *supra*, this list was seized by Meade acting as a private individual. It was therefore properly included in the affidavit in order to specify the things to be seized.

[14]The court instructed the jurors as follows (Tr. 952-953):

In determining whether the Chicago films in this case are obscene, the basic guidelines for the jury are:

A. Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest.

B. Whether the work depicts or describes sexual conduct in a patently offense [sic] way, and

C. Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

("prurient interest"), then correctly explained the phrase "contemporary community standards" to the jury at length (Tr. 953-955). The trial judge then properly instructed the jurors about the substance of the second ("patently offensive") and third ("lacks serious social value") prongs of the *Miller* standards (Tr. 955-956).

Nonetheless, petitioner suggests that the trial court erred by limiting the jury's consideration of "contemporary community standards" to the "prurient interest" portion of the *Miller* test. However, the court's charge concerning "contemporary community standards" followed its explanation of "prurient interest" and preceded its explanation of "patently offensive." Moreover, the court expressly pointed out that the evaluation of "contemporary community standards" was generally applicable to the question of obscenity (Tr. 955):

> Obscenity is not a matter of individual taste. The personal opinion of a juror as to the material here in question is not the proper basis for a determination whether or not the material is obscene. As stated before, the test is how the average person of the community as a whole would view the material.

The court of appeals therefore correctly concluded that the instructions taken as a whole properly informed the jurors on the matter of obscenity (Pet. App. A32). See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); cf. *Pinkus* v. *United States*, 436 U.S. 293, 297 (1978).

5. Finally, petitioner argues (Pet. 38-40) that the evidence was insufficient to support his conviction for aiding and abetting the interstate transportation of the Chicago films. This factual claim was rejected by the

jury, the district court and the court of appeals, and further review is not warranted. *Berenyi* v. *Immigration Director, supra.* In any event, the testimony demonstrated that the Chicago burglary was originally petitioner's idea, that he directed Meade and Gentry to commit the burglary, and that he approved a second attempt when the first try was aborted. Furthermore, following the theft of the films, Gentry and his two cohorts immediately drove to petitioner's house where they slept for several hours and where they were paid by petitioner in accordance with their mutual understanding. In these circumstances, the jury could reasonably have concluded that petitioner had voluntarily associated himself with the burglary and interstate transportation of the films, and, indeed, that his efforts were essential to the success of the venture. See, *e.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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